



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 14, 1997

Ms. Joanne Wright  
Associate General Counsel  
Texas Department of Transportation  
Dewitt C. Greer State Highway Bldg.  
125 E. 11th Street  
Austin, Texas 78701-2483

OR97-2494

Dear Ms. Wright:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 110053.

The Texas Department of Transportation (the "department") received two requests for information related to the filling of job vacancy number 6-10-B010-024. One of the requestors additionally seeks access to the personnel file of a department employee. You assert that the information is excepted from disclosure pursuant to section 552.103 of the Government Code. We have considered your arguments and have reviewed the information submitted.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the governing body is or may be a party. The governing body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The governing body must meet both prongs of this test for information to be excepted under section 552.103(a). We note that when the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You supplied this office with a copy of a complaint of discrimination related to different terms and conditions of employment, filed with the Texas Commission on Human Rights (the "TCHR") by a department employee. The TCHR operates as a federal deferral agency under section 706(c) of title VII, 42 U.S.C. § 2000e-5. The Equal Employment Opportunity Commission ("EEOC") defers jurisdiction to the TCHR over complaints alleging employment discrimination. *Id.* This office has stated that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 (1983) at 2, 336 (1982) at 1.

By showing that a complaint filed with the TCHR is pending, you have shown that litigation is reasonably anticipated. However, upon review of the information submitted, we conclude you have not met your burden in demonstrating how this information is related to the anticipated litigation. The department, therefore, may not withhold the requested information under section 552.103(a).

We note, however, that the information submitted to this office contains the home addresses, telephone numbers and social security numbers of various individuals. Section 552.117 of the Government Code excepts from public disclosure information relating to the home address, home telephone number, and social security number of a current or former government employee or official, as well as information revealing whether that employee or official has family members. Section 552.117 requires you to withhold this information for an official, employee, or former employee who requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold this information if the employee had not made a request for confidentiality under section 552.024 at the time this request for the documents was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5.<sup>1</sup>

The documents submitted also contain Texas drivers' license information. The Seventy-fifth Legislature added section 552.130 to the Open Records Act which governs the release and use of information obtained from motor vehicle records. Section 552.130 provides in relevant part as follows:

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<sup>1</sup>Federal law may prohibit disclosure of the social security numbers contained in the submitted documents. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). We note that the federal statute provides that the law requiring the maintenance of the employee's social security number must have been enacted on or after October 1, 1990. In other words, the fact that the social security number was obtained after October 1, 1990 by itself does not dispose of the issue. Based on the information you have provided, we are unable to determine whether the social security numbers are confidential under this federal statute. We note, however, that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information.

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]

\* \* \* \*

(b) Information described by Subsection (a) may be released only if, and in the manner, authorized by Chapter 730, Transportation Code.

*See* Act of May 29, 1997, S.B. 1069, § 4, 75th Leg., R.S. (to be codified at Gov't Code § 552.130). Therefore, you must withhold the copy of a Texas driver's license contained in the submitted information pursuant to section 552.130.

In addition, the submitted documents include an employee's W-4 tax form. A W-4 form is confidential as a matter of law. *See* 26 U.S.C. § 6103(a); Open Records Decision No. 600 (1992) (concluding that employee W-4 forms are excepted from public disclosure by 26 U.S.C. § 6103(a)). Accordingly, you must withhold the form under section 552.101 of the Government Code which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

Finally, we note the submitted documents include medical records, access to which is governed by provisions outside the Open Records Act. Open Records Decision No. 598 (1991). The Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes, protects from disclosure "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." V.T.C.S. art. 4495b, § 5.08(b). The MPA provides for both confidentiality of medical records and certain statutory access requirements. *Id.* at 2. The medical records submitted to this office for review may only be released as provided by the MPA.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/alg

Ref.: ID# 110053

Enclosures: Submitted documents

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